



The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 16 (2002)

Article 6

Extradition, the Charter and Due Process: Is Procedural Fairness Enough?

Dianne L. Martin

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Citation Information

Martin, Dianne L.. "Extradition, the Charter and Due Process: Is Procedural Fairness Enough?." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 16. (2002).
<http://digitalcommons.osgoode.yorku.ca/sclr/vol16/iss1/6>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

EXTRADITION, THE CHARTER, AND DUE PROCESS: IS PROCEDURAL FAIRNESS ENOUGH?

Dianne L. Martin *

I. INTRODUCTION

The promises inherent in the guarantee of the rule of law serve an ideological function in a liberal democracy.¹ However, the rule of law, and in particular the safeguards of due process, can and should serve more than a legitimating function. That is particularly true in regard to the criminal law, where the rule of law represents a promise that both the definition of criminal conduct and the selection of criminal subjects will be done fairly, never arbitrarily, and in a transparent manner. In turn the principles of fairness, transparency and legality, if honoured in form as well as substance, in spirit as well as letter, should deliver real, not merely rhetorical, security and safety. However, these are fragile principles, subject to competing arguments and to incremental erosion. That is particularly true when due process is portrayed as a hurdle for law enforcement to jump, as an obstacle to a swift and effective response to violence and terror, as is the case today, and has been the case on many occasions in the past.² Although the conditions facing government and challenging the principles of due process have been portrayed as unique in the weeks and months following the crimes of September 11, the rule of law has faced significant challenges before. The more some things change, the more they remain the same.

* Associate Professor, Osgoode Hall Law School. She is the current Director of the Innocence Project, a clinical programme concerned with wrongful convictions, Director of the Part-time LLM in Criminal Law and the Institute for Feminist Legal Studies.

¹ See, for example, Hutchison, *The Rule of Law: Ideal or Ideology?* (1987); Kennedy, *A Critique of Adjudication* (1997).

² This was the insight that inspired Herbert Packer's groundbreaking analysis of the criminal justice system and the argument that the system moves between due process concerns and law enforcement demands in a cyclical manner: Packer, *The Limits of the Criminal Sanction* (1968).

Thirty years ago terrorism was a domestic, not a foreign, threat. In the United States in the 1960s and 1970s, equality seekers such as African Americans and Native Americans, along with their student supporters,³ were treated by the FBI as a threat as great as communists had been perceived to be by Senator McCarthy and his supporters in the 1950s. The same was true in Canada, although the rhetoric was less heated, as the RCMP and local police devoted considerable resources to surveying, infiltrating and disrupting domestic political opponents.⁴ These threats were attacked as aggressively as foreign threats are in 2002 — civil libertarian traditions, the rule of law and guarantees of due process notwithstanding.

Remembering this recent past is important in assessing the significance of Canada's 20 years of experience with an entrenched charter of rights and in evaluating current threats to due process. We now know, for example, that some, at least, of that earlier law enforcement effort was fatally flawed and not simply because it was illegal. The extreme methods used by law enforcement in the name of liberty produced bad data — they got the wrong people — and missed the right ones. Despite the Constitution, arguably well-meaning activists such as environmentalists were targeted in the United States and may actually have been deliberately framed as terrorist bombers,⁵ civil rights and protest

³ COINTELPRO is an acronym for the FBI's domestic "counterintelligence programs" developed to neutralize political dissent and dissidents. Although covert operations have been employed throughout FBI history, the formal COINTELPROs conducted between 1956-1971 were broadly targeted against radical political organizations. The existence of these operations was revealed publicly following an unsolved break-in into the FBI's Media PA resident agency. Their extent was revealed in separate lawsuits by NBC Correspondent Carl Stern and the Socialist Workers' Party, and a U.S. Senate investigation led by Senator Frank Church. The "Church Committee" reports, *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate*, 94th Congress, 2nd Session, 1976: Intelligence Activities and the Rights of Americans, Book II, and Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III, are a remarkable record of illegal activities, including a detailed study of "Dr. Martin Luther King, Jr., Case Study"; "The FBI's Covert Action Program to Destroy the Black Panther Party"; and, for the purposes of this paper, "The Use of Informants in FBI Intelligence Investigations." The Church Committee Reports, and other relevant original sources are available at <http://www.derechos.net/paulwolf/cointelpro/cointel.htm> (date accessed: April 5, 2002).

⁴ *The Canadian Security Intelligence Service*, prepared by Philip Rosen, Senior Analyst (rev'd January 24, 2000), online: Canada <<http://www.parl.gc.ca/information/library/PRBpubs/8427-e.htm>> (date accessed: April 5, 2002).

⁵ A law suit making precisely this claim, brought by environmentalist Judi Bari, went to trial in April 2002 and ended successfully for the plaintiffs on June 11, 2002. Earth First! activist Darryl Cherney and the estate of Judi Bari, who died of cancer in 1997, successfully sued seven former and current FBI agents and Oakland policemen for false arrest, illegal search, slanderous statements and conspiracy for police conduct following a May 1990 bomb explosion. They claimed officials ignored evidence exonerating the activists and lied to try to make their case. Jurors

groups were infiltrated and destabilized, and members were prosecuted on false evidence.⁶ The lessons of that history, and those derived more recently from the “laboratory of wrongful convictions”⁷ support the argument that due process is and should be more than a guarantor of fairness in the game sense of ensuring that the formal rules are followed.⁸ Substantive due process also ensures accuracy of outcome and contributes to security and safety in ways that neither its breach nor its merely formal recognition can. That is the argument made in this brief

consideration of the Charter,⁹ extradition law and current threats to due process. That is, that achieving rectitude of decision making through fair, efficient and transparent investigations and prosecutions reduces error and thereby increases security, despite attempts to argue the contrary. The lessons learned from the “laboratory of wrongful convictions” are utilized in an examination of the 1976 extradition from Canada of American Indian Movement leader Leonard Peltier and then applied to the record of the Supreme Court’s cautious extension of Charter rights to extradition and expulsion cases.

awarded 4.4 million dollars in damages after 17 days of deliberations: Associated Press, “Jury awards California activists \$4.4 million,” (June 11, 2002), online: *The New York Times* on the Web <www.nytimes.com> and Judi Bari home page <www.judibari.org> (date accessed June 11, 2002). Most of the pleadings and evidence relied on in the various motions and a range of journalistic accounts are found at the Bari home page: <<http://www.judibari.org>> (date accessed: April 6, 2002). That page reproduces the judgment finally dismissing a motion to strike the statement of claim: “To summarize them, plaintiffs charge that their (false) arrest and the attendant searches (including the second search of Judi’s house a month after the bombing) were deliberately carried out without probable cause, through the instigation of the FBI and with the knowing and willing cooperation of the Oakland Police Department, for the purpose of politically discrediting and “neutralizing” plaintiffs’ organizing work on behalf of Redwood Summer, Earth First!, and the environment generally” [www.judibari.org/%60legal_index.html].

⁶ Churchill and Vander Wall, *Agents of Repression: The FBI’s Secret Wars Against the Black Panther Party and the American Indian Movement* (1988); Amnesty International, *Proposal for a Commission of Inquiry into the Effect of Domestic Intelligence Activities on Criminal Trials in the United States of America* (1981). In Canada see McDonald, *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police* (1981).

⁷ The expression refers to the more than 200 cases of wrongful conviction discovered in the past 10 or so years across the common-law world: Martin, “Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence” (2002) UMKC L. Rev. (forthcoming).

⁸ Rules that can be dismissed as a “luxury” at times of danger.

⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

II. WRONGFUL CONVICTIONS, EXTRADITION AND THE RULE OF LAW

The Rule of Law promises that the exercise of state power will not be arbitrary. That means that the rules — the substantive law — will be certain, known and knowable and prospective so that all can know how to conduct themselves and their affairs. It also means that the rules (and the benefits) will apply equally to all, and be enforced equally and transparently, without bias or favour. Criminal investigations will be conducted fairly without corruption, illegality or abuse of authority. Criminal trials will be held publicly, before an independent tribunal. The rights of the accused will be respected: she or he will know the case he or she has to meet, will have the effective assistance of counsel and the right to make full answer and defence. The principles are well known.

It is also well known that in the cases of wrongful conviction, these principles were not honoured, but rather were, in most cases, deliberately and methodically trampled.¹⁰ If this is so, it becomes important to ask in what other circumstances — less visible than the high profile cases and trials in the known roster of wrongful conviction, and even secret in the case of political investigations and prosecutions — that these principles were not honoured, even in the breach. Moreover, given the opportunity for reflection that the wrongful conviction cases provide, we must ask whether we are protecting the right values by protecting the form but ignoring the substance. In that context it is well to remember that due process claims that hold the state and state agents to account are not popular. Lord Denning's chilling comment in the IRA pub bombing case known as the "Birmingham Six" (subsequently revealed to be one in a series of British wrongful convictions) that to permit a lawsuit to continue against police for their treatment of the accused in obtaining confessions would suggest that it was possible that the police had lied to put innocent men behind bars, is a classic case in point. In striking the statement of claim, he described this possibility as "an appalling vista" that he would not countenance.¹¹

¹⁰ The growing literature analyzing wrongful convictions makes this clear. For example, see Martin, "The Police Role in Wrongful Convictions: An International Comparative Study" in Westervelt and Humphrey (eds.), *Wrongly Convicted: When Justice Fails* (2001).

¹¹ *McIlkenney v. Chief Constable of West Midlands Police Force*, [1980] Q.B. 283 (C.A.), *affd*, *Hunter v. Chief Constable of West Midlands Police Force*, [1982] A.C. 529 (H.L.). Of course, as subsequent investigation finally established, after innocent men had spent many years behind bars, that is exactly what they had done. They were finally released in March 1991. The details of the misconduct are set out in Mullin, *Error of Judgement: The Truth About the Birmingham Bombings* (rev'd ed. 1990.).

Unthinking faith in the propriety of investigative and prosecution conduct contributes to the idea that rules that advance the search for truth are those that assist the prosecution to present a wider array of inculpatory evidence.¹² Rules that are relied on by the defence are often categorized as advancing “fairness,” without recognition that proper investigation practices, whether justified as ensuring fairness or not, will also, in most cases, contribute to reliability. This odd bias is apparent even in the context of a wrongful conviction, where almost none of the prosecution evidence is true, and the wrong person was selected as a suspect, investigated, prosecuted and convicted. For example, in dealing with jailhouse informants, “the most deceitful and deceptive group of witnesses known to frequent the courts,” Justice Cory, in his recommendations arising out of the wrongful conviction of Thomas Sophonow, was concerned only that “their presence as witnesses signals the end of any hope of providing a *fair trial*”¹³ (emphasis added).

The Thomas Sophonow case illustrates the limits of formal due process well. Sophonow was tried three times for the December 1981 murder by strangling of Barbara Stoppel in Winnipeg, Manitoba, before finally being not just acquitted but exonerated in 2000. He should never have been convicted at all. There was no known connection between Stoppel and Sophonow, and the prosecution’s case which rested on highly dubious eyewitness testimony, was augmented by jailhouse informers. No fewer than 11 had come forward before the third trial. Justice Cory was moved to make remarkably detailed findings and recommendations to limit the use of such testimony in the future. He framed his findings in the context of providing the accused with a fair trial:

Their testimony has all too often resulted in a wrongful conviction. When such a miscarriage of justice occurs, the entire system of justice suffers. *Indeed, the entire community suffers as a result of the demonstrated inability to provide the accused with a fair trial.* How many wrongful convictions must there be before the use of these informants is forbidden or, at least, confined to very rare cases. In the rare case that they are called, their testimony should automatically be subject to the strongest possible warning to jurors to approach it with great caution. Lawyers, particularly Crown Counsel and Judges, must be made aware of the irreparable damage that these informants can cause to the administration of justice in Canada.¹⁴ [Emphasis added.]

¹² Martin, “Developments in The Law of Evidence: The 1996-97 Term: The Adversary Process and The Search for Truth” (1998), 9 S.C.L.R. 345; Martin, “Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies” (1998), 36 Osgoode Hall L.J. 151.

¹³ *Jailhouse Informants, Their Unreliability, and the Importance of Complete Crown Disclosure Pertaining to Them* [The Sophonow Inquiry, online: <<http://www.gov.mb.ca/justice/sophonow/jailhouse/index.html>> (date accessed: April 2, 2002).

¹⁴ *Ibid.*

This definition of due process as a concern primarily of fairness to an accused obscures issues of evidence reliability and investigative misconduct. In turn, it legitimates the decision that close scrutiny of the evidence and evidence-gathering procedures will never be permitted in extradition and other cases which rest on an assumption of investigative reliability and probity — even when a reasonable question of misconduct is raised. For this reason, extradition is a useful procedure against which to test the proposition that due process should include the potential for deeper scrutiny of investigative conduct. It is a procedure on the margins of the criminal justice system, enjoys few formally protected due process safeguards, and often concerns cases that challenge any claim to fairness at all. The requesting state needs only to produce, in documentary form, a *prima facie* case. The process relies upon the “good faith of nations” to ensure that the fugitive is not in effect being hijacked with false evidence to face an unfair trial. The fugitive, whose probable guilt is assumed for the purposes of the process, has no right of confrontation, no right to challenge the facts or the witnesses brought against him. These limits render illusory the affirmation by the Supreme Court that extradition proceedings must comply with due process safeguards and will attract constitutional protection, in particular that of section 7.¹⁵

Indeed the Court has been very clear that the scope of that protection is narrow.¹⁶ In the majority of cases where the Charter was relied on, they have ruled consistently that absent “extreme circumstances,” they will not consider arguments suggesting that the extradition process violates Canadian constitutional rights, as there is a presumption that the receiving country will afford the fugitive a fair trial. There are clearly good and pragmatic reasons for this caution,

¹⁵ For example, the Court found constitutional error in *United States v. Kwok*, [2001] 1 S.C.R. 532; *United States v. Tsioubris*, [2001] 1 S.C.R. 613; *United States v. Cobb*, [2001] 1 S.C.R. 587; *United States v. Shulman*, [2001] 1 S.C.R. 616; and *United States v. Burns*, [2001] 1 S.C.R. 283.

¹⁶ Even those rules which raise issues of reliability as well as fairness are beyond review in extradition cases. In *R. v. Harrer*, [1995] 3 S.C.R. 562, an inculpatory statement obtained when Harrer was interrogated in the United States concerning immigration status was held by the Supreme Court to be admissible despite a Charter breach. The breach, failure to give a right-to-counsel warning when questioning changed focus from the immigration matter to possible involvement with an offence in Canada, was not recognized in U.S. law. The Court analyzed the rule concerning a secondary caution only in the context of the importance of ensuring the fairness of the Canadian justice system and general respect for Canadian constitutional values. Because this issue did not arise with respect to police forces abroad, the Court concluded that the only relevant concern was the “fairness” of the trial, with no consideration of the reliability of the statement. That justification for the confessions rule was never alluded to.

of course. As Justice La Forest noted in the frequently cited case *Canada v. Schmidt*:¹⁷

The present system of extradition works because courts give the treaties a fair and liberal interpretation with a view to fulfilling Canada's obligations, reducing the technicalities of criminal law to a minimum and *trusting the courts in the foreign country to give the fugitive a fair trial*, including such matters as giving proper weight to the evidence and adequate consideration of available defences and the dictates of due process generally.¹⁸ [Emphasis added.]

The rationale for the rule is clear:

Extradition is the surrender by one state to another, on request, of persons accused or convicted of committing a crime in the state seeking the surrender. This is ordinarily done pursuant to a treaty or other arrangement between these states acting in their sovereign capacity and obviously engages their honour and good faith.¹⁹

The factual foundation of the request for extradition is based on at least some evidence that the fugitive committed the crime in question:

That is why provision is made in the treaties and in the *Extradition Act* to ensure that, before the discretion to surrender can be exercised, *a judicial hearing must be held for the purpose of determining whether there is such evidence of the crime alleged to have been committed in the foreign country as would, according to the law of Canada, justify his or her committal for trial if it had been committed here*.²⁰ [Emphasis added.]

This safeguard rests on the belief that the requesting state will act in good faith and only present genuine evidence to the judicial hearing — otherwise, the hearing provides no safeguard at all. In other words, the most salient safeguard for the fugitive is the assumption that Canada only enters into extradition treaties with those countries it “knows” will afford a fugitive a fair trial. The reality that a “fair trial” premised on the presence of formal safeguards alone may still produce a miscarriage of justice is only now being acknowledged, albeit somewhat reluctantly. The difficulty, of course, is that because of the scores of wrongful convictions that have come to light, we now know that apparently guilty people, who give apparently truthful confessions, are not guilty at all. Rules which merely require an assertion of compliance have turned out to be inadequate guarantors of either fairness or a reliable result.

¹⁷ [1987] 1 S.C.R. 500.

¹⁸ *Ibid.*, at 524.

¹⁹ *Ibid.*, at 514.

²⁰ *Ibid.*, at 515.

III. THE LABORATORY OF WRONGFUL CONVICTIONS

Wrongful convictions are more than a failure of justice. These cases provide an opportunity to examine critically both the practices of criminal investigation and the scope of review. Advances in investigative techniques and forensic science such as DNA identification have contributed to the identification and remedy of wrongful convictions all over the common-law world.²¹ These cases provide a virtual laboratory for examining the criminal justice process. Errors in death penalty cases in the United States have generated enormous scholarly attention.²² The IRA pub bombing wrongful convictions in Britain generated first a Royal Commission and then an independent agency for the review of cases.²³ In Canada²⁴ and Australia,²⁵

²¹ The National Institute of Justice analysis of 28 DNA exonerations was enormously valuable in this regard: Connors *et al.*, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial* (1996). For a follow up analysis, including the scores of exonerations since 1996, see: Scheck and Neufeld, "DNA and Innocence Scholarship" in Westervelt and Humphrey (eds.), *Wrongly Convicted: When Justice Fails*, (2001), at 241-52.

²² Bedau and Radelet, "Miscarriages of Justice in Potentially Capital Cases" (1987), 40 *Stan. L. Rev.* 21-179; Huff, Rattner, and Sagarin, *Convicted But Innocent: Wrongful Conviction and Public Policy* (1996); Radelet, Bedau and Putnam, *In Spite of Innocence* (1992); Radelet, Lofquist and Bedau, "Prisoners Released from Death Rows since 1970 Because of Doubts About Their Guilt" (1997), 13 *T.M. Cooley L. Rev.* 907-966; Rosenbaum, "Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988" (1990-91), XVIII:3 *Review of Law & Social Change* 807-830. Most recently, Professor James S. Liebman and Professor Simon H. Rifkind, of Columbia University School of Law, published their review of all death penalty cases in the United States since 1972: *A Broken System: Error Rates in Capital Cases, 1973-1995*. The study, initially commissioned by the Senate Judiciary Committee in 1991, found an overall rate of prejudicial error in the American capital punishment system of 68 percent. Of this number, on retrial 82 percent of the people whose capital judgments were overturned by state post-conviction courts due to serious error were found to deserve a sentence less than death when the errors were cured on retrial; 7 percent were found to be innocent of the capital crime. The nature of the errors are significant for consideration of the meaning of due process. The most common errors (the majority) were "(1) egregiously incompetent defense lawyers who didn't even look for — and demonstrably missed — important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who did discover that kind of evidence but suppressed it, again keeping it from the jury": online: The Justice Project <<http://justice.policy.net/jpreport>> Executive Summary (date accessed: June 1, 2002). An equally troubling record was found in a study of death penalty cases in Illinois. That report has just been published: *Report of the Governor's Commission on Capital Punishment* (April 2002), online: Governor's Commission on Capital Punishment <http://www.idoc.state.il.us/ccp/ccp/reports/commission_reports.html> (date accessed June 1, 2002).

²³ Journalistic accounts of the IRA cases were instrumental in exposing the wrongful convictions. See Conlon, *Proved Innocent* (1991); McKee and Franey, *Time Bomb: Irish Bombers, English Justice, and the Guilford Four* (1988); Mullin, *Error of Judgment: The Truth About the Birmingham Bombings* (1990). The scandal led to *The Royal Commission on Criminal Justice* (1991) and the formation of the Criminal Cases Review Commission (CCRC). The Web site provides a wealth of

both popular accounts and Commissions of Inquiry have been influential in generating a new awareness of the fallibility of the prosecution process, and informed scholarly critiques of current investigative and prosecution practices.

Some well-founded propositions have emerged from this literature. The systemic nature of wrongful convictions is being recognized, and the more comforting notion these are merely the inevitable errors of a human system²⁶ has been refuted for the most part. Instead it has become clear that most wrongful convictions could have been prevented by challenging the bias dubbed “tunnel vision” (a compendium of common heuristics and logical fallacies), which is fueled by pressure to resolve a high-profile crime or is internally generated by resource and other institutional forces. Investigators blinded by tunnel vision focus on a suspect and then select and filter the evidence that will “build a case” for conviction, while ignoring or suppressing evidence that points away from guilt. All stages of the process, from witness interviews, eyewitness procedures, interrogation of suspects and the management of informers, may be contaminated in ways that have been identified in virtually all known cases of wrongful conviction.²⁷ The pressure to resolve the case contributes to what has

data: <<http://www.ccrcc.gov.uk>>. Recent statistics may be found at http://www.ccrcc.gov.uk/latestnews/latestnews_case.html (date accessed: April 2, 2002). Also see Zuckerman, “Miscarriage of Justice — A Root Treatment”, [1992] 323-45.

²⁴ In Canada see, for example, Karp and Rosner, *When Justice Fails: The David Milgaard Story* (1991); Makin, *Redrum the Innocent: The Guy Paul Morin Story* (1998). Inquiries have been held concerning three of the more notorious wrongful convictions; another is expected soon concerning the David Milgaard case. See Hickman, Poitras and Evans, *Royal Commission on the Donald Marshall, Jr. Prosecution* (1989); Kaufman, *Commission on Proceedings Involving Guy Paul Morin* (1998), online: Ontario, Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/morin.htm>> (date accessed: April 2, 2002); and Cory, *The Inquiry Regarding Thomas Sophonow*, (2002), online: <<http://www.gov.mb.ca/justice/sophonow/index.html>> (date accessed: April 2, 2002). And see Martin, “Unredressed Wrong: The Extradition of Leonard Peltier from Canada” in Boyd and Menzies (eds.), *(Ab)Using Power: The Canadian Experience* (2001), at 214-35.

²⁵ In Australia, see *The Royal Commission of Inquiry into Chamberlain Convictions* (1987); Wood, *The Royal Commission into the New South Wales Police Service*. (1997).

²⁶ Markman and Cassell, “Protecting the Innocent: a Response to the Bedau-Radelet Study” (1988), 41 Stan. L. Rev. 121; Cassell, “Protecting the Innocent from False Confessions and Lost Confessions — And from *Miranda*” (1998), 88 J. Crim. L. & Criminology 497.

²⁷ It was addressed most recently by retired justice the Honourable Peter Cory in the Sophonow Inquiry. He said:

Tunnel Vision is insidious. It can affect an officer or, indeed, anyone involved in the administration of justice with sometimes tragic results. It results in the officer becoming so focussed upon an individual or incident that no other person or incident registers in the officer’s thoughts. Thus, tunnel vision can result in the elimination of other suspects who

been called “noble cause corruption” (a version of the “ends justify the means” philosophy), first identified in England by Sir John Woodcock, the Chief Inspector of Constabulary, in 1992.²⁸ The conduct that is explained in this way may include everything from disregard for due process safeguards, to overt pressure on witnesses to give evidence that will support a conviction of the selected suspect, to falsification of evidence, all in the name of securing a conviction of someone police have decided is guilty.²⁹

We know as well that when the community is particularly frightened or angered by the crime and the accused is a marginalized or racialized outsider, the risk increases.³⁰ These errors are difficult to discern or to refute, but their persistence renders the preservation of due process safeguards more than a luxury. It is particularly important when there are few, if any, means to test the evidence or the investigation, such as occurs in extradition and cases driven by the new national security regime, where much of the evidence is produced in affidavit form and rests on informer information filtered through the lens of law enforcement.

IV. THE EXTRADITION OF LEONARD PELTIER

The story of the extradition of Leonard Peltier from Canada more than 25 years ago provides an ideal case study for considering issues of extradition, wrongful conviction and due process. Leonard Peltier is serving two consecutive life sentences for the murder of two FBI Special Agents killed during a four-hour-long fire fight on the Pine Ridge Indian Reservation in South Dakota on June 26, 1975. His extradition from Canada in 1976, trial in North Dakota and continued imprisonment without parole are widely seen as unjust, but

should be investigated. Equally, events which could lead to other suspects are eliminated from the officer's thinking. Anyone, police officer, counsel or judge can become infected by this virus.

Cory, *The Inquiry Regarding Thomas Sophonow*, (2002). See recommendations: <<http://www.gov.mb.ca/justice/sophonow/index.html>> (date accessed: April 2, 2002).

²⁸ He used the phrase in a speech to the International Policing Exhibition and Conference, October 13, 1992, and it was picked up and discussed by Metropolitan Commissioner Paul Condon addressing the Commons Select Committee on Home Affairs: *The Independent* (March 25, 1993).

²⁹ The nomenclature was critiqued by Wood J. in his examination of corruption in the New South Wales police in Australia. He preferred the term “process corruption” and defined it in helpful terms: “It is often directed at those members of the community who are least likely or least able to complain, and is justified by police on the basis of procuring the conviction of persons suspected of criminal or anti-social conduct, or in order to exercise control over sections of the community.” Wood, *Royal Commission into the New South Wales Police Service: Final Report, Volume I: Corruption*, (1997).

³⁰ Scheck and Neufeld, *supra*, note 21, at 241-52; Martin, *supra*, note 10.

efforts to reopen the extradition to obtain either a new trial or presidential clemency have so far failed.³¹ Most recently, the Innocence Project of Osgoode Hall Law School took up the case.³² They were responding to the assertion of Canadian Minister of Justice Anne McLellan that there was no new evidence to warrant reconsideration of the extradition, made to U.S. Attorney General Janet Reno in a letter dated October 12, 1999. The history of that assertion is that, while Canadian Department of Justice officials have long officially denied that an extradition fraud occurred, others, equally well informed, have repeatedly expressed concern about it.³³ The Innocence Project³⁴ undertook to search for the evidence that would resolve this dispute.

³¹ The Canadian part of the story is told briefly in Martin, "Unredressed Wrong," *supra*, note 24, while the entire story is set out in Matthiessen, *The Spirit of Crazy Horse* (2d ed. 1991); and see <http://freepeltier.org/press_release/040402.htm> (date accessed: July 2, 2002) for details of a lawsuit just launched because of a campaign conducted by the FBI to stop former president Bill Clinton from issuing Peltier a grant of executive clemency during his last days in office. FBI agents across the nation submitted letters to the editor, sponsored major newspaper and radio ads, and marched by the hundreds in front of the White House to discourage clemency. Former FBI Director Louis Freeh wrote searing letters to Bill Clinton and Janet Reno to urge against Peltier's release. The campaign, which gained national attention, characterized Peltier as a cold-blooded killer who brutally shot two FBI agents at point blank range. Peltier's attorneys and supporters assert that this characterization is not only false but intentionally deceptive given the government's long-held position that it cannot prove who shot the agents. Furthermore, they say it cost Peltier, now 57 years of age and in poor health, his deserved freedom.

³² The Innocence Project is a clinical programme at Osgoode Hall Law School, York University, Toronto, Ontario, Canada, which involves law students under the supervision of the current Director Dianne L. Martin in investigating and seeking to remedy miscarriages of justice (<<http://www.yorku.ca/dmartin/Innocence/innocenc.htm>>). The work of the Innocence Project on behalf of Leonard Peltier actually began five years ago when the Aboriginal Law Students Society at Osgoode Hall Law School took up his cause and culminated in a lengthy brief to then President William Clinton based on the evidence gathered by the Innocence Project, including evidence given before the Honourable Fred Kaufman December 2000: The Innocence Project, Osgoode Hall Law School, York University, Director: Dianne L. Martin, *The Wrongful Extradition of Leonard Peltier from Canada: Brief in Support of the Grant of Executive Clemency*, (December 5, 2000), online: <<http://osgoode.yorku.ca/QuickPlace/innocenceproject/Main.nsf/>> (date accessed: April 8, 2002).

³³ Former Solicitor General of Canada, and former Minister of Indian Affairs, the Honourable Warren Allmand reported to then Justice Minister Allan Rock on August 8, 1995, that his review of the extradition files convinced him that there was fraud and misconduct at the extradition and that he should either say so, in support of an application for clemency, or order an independent external review of the matter. Justice Minister Rock did not act. However, on October 12, 1999, his successor, Anne McLellan, chose to rely instead on the position the extradition group of the Department of Justice has always taken in this case, did not refer it for an independent review, and wrote to U.S. Attorney General Janet Reno that "no evidence has come to light since [1976] that would justify the conclusion that the decisions of the Canadian courts and the Minister should be interfered with."

New evidence was in fact available concerning FBI conduct consistent with what is now known to be a factor in many wrongful convictions and consistent with “COINTELPRO” (Counter Intelligence Program) misconduct. Both the operation of “tunnel vision” as the case was built and the rationalization of “noble cause corruption” in the use of unreliable evidence from informers and jailhouse informers emerged as significant factors in the extradition case.

1. Tunnel Vision

The shooting deaths of two federal agents (and one aboriginal man) during a still unexplained firefight on Pine Ridge Indian Reservation set off one of the largest manhunts in American history. All members of the American Indian Movement who were on Pine Ridge on June 26, 1975, were suspects, with little to distinguish one from another, as all were armed and all participated in the firefight between law enforcement and the residents of Pine Ridge. Leonard Peltier was initially selected as a suspect because there was an outstanding charge against him in Wisconsin of attempted murder of a police officer (which they described as a conviction).³⁵ The motive for his choice out of many bears no relation to hard evidence, as an early FBI telex reveals:

Inasmuch as solid evidence has been uncovered placing Leonard Peltier at the scene of the crime firing at Law Enforcement, consideration is being given to obtaining a warrant for aiding and abetting murder, Cir. AUSA has verbally given his authorization. Even though Peltier might be deceased, *much benefit could be obtained from national press showing type of individual agents faced in battle.* [Emphasis added.]³⁶

The FBI strategy in regard to Leonard Peltier, and the others who were eventually charged, is a classic example of “tunnel vision.” While today, tunnel vision is understood as a major cause of wrongful convictions, in July 1975 it was common practice. In order to build a case against this useful suspect, the FBI decided to first: “[d]evelop information to lock Peltier and Black Horse into this case” and then “[d]evelop additional confidential informants and

³⁴ The Innocence Project was supported by the Association in Defense of the Wrongly Convicted (AIDWYC); a coalition of Canadian labour organizations and unions; and The Leonard Peltier Defence Committee Canada.

³⁵ It is relevant to note in assessing the forensic, as contrasted with the public relations, value of this information, that Leonard Peltier was readily acquitted by a jury on the Wisconsin charge and in fact has no criminal record (apart from the murder convictions).

³⁶ Teletype from SAC Richard G. Held, Pine Ridge to Director, dated July 6, 1975, six pages: Martin, “Unredressed Wrong,” *supra*, note 24.

sources” and only then engage in “[e]xamining the evidence and connecting it to the suspects.”³⁷

There was little direct evidence to “lock Peltier” into the case, but the FBI did “develop” a confidential informant. That informant provided the only direct evidence of Leonard Peltier’s guilt presented at the extradition hearing. It consisted of two affidavits sworn by one Myrtle Poor Bear: one on February 23, 1976, and another on March 31, 1976.³⁸ These two affidavits were not entirely consistent. In the February 23, 1976 affidavit, Myrtle Poor Bear stated that she was Leonard Peltier’s girlfriend around the time the agents were shot and that she was aware that Leonard Peltier was in charge of planning how to kill any police officer or FBI agent who came onto the reservation and how to escape thereafter. She then swore that she saw him shoot both agents.³⁹ In the March 31, 1976, affidavit, the claim that she was Leonard Peltier’s girlfriend is repeated. This time, the affidavit describes Leonard Peltier shooting one of the wounded FBI agents as that agent threw down his handgun and told Mr. Peltier that he was surrendering. The affidavit continues that Mr. Peltier shot the agent even though Myrtle Poor Bear tried unsuccessfully to pull him away. The description is of a cold-blooded execution.⁴⁰

On May 3, 1976, the extradition hearing began in Vancouver, British Columbia. On June 18, 1976, the extradition judge, Schultz J. of the British Columbia Supreme Court, ordered Mr. Peltier committed for extradition on the murders of Agents Williams and Coler. Myrtle Poor Bear was the heart of the case. He did not know that a third affidavit existed, inconsistent in part with the two he read, where she swore she had *not* witnessed the murders, but that she had merely heard Peltier confess to them. That affidavit had been suppressed. Nor did he know that in any event *none* of the affidavits were true in *any* respect. Not surprisingly, when he ordered the committal, he was brief in his discussion of the evidence on the FBI murders.

However, evidence of the suppression of a contradictory affidavit, and evidence confirming that all the Poor Bear affidavits were false, surfaced before Mr. Peltier was surrendered to the United States. Given the law of the day, that information did not change anything. On December 17, 1976, Justice Minister

³⁷ Teletype from Rapid City FBI to Director, “Daily Summary Teletype” dated July 16, 1975, two pages: Martin, “Unredressed Wrong,” *supra*, note 24.

³⁸ Affidavits of Myrtle Poor Bear sworn before clerk B. Berry, February 23, 1976. Affidavit of Myrtle Poor Bear sworn before clerk B. Berry, March 31, 1976. Exhibit No. 1 of the Canadian Hearing, October 25, 2000: Martin, “Unredressed Wrong,” *supra*, note 24.

³⁹ Affidavit of Myrtle Poor Bear sworn before clerk B. Berry, February 23, 1976. Exhibit No. 1 of the Canadian Hearing, October 25, 2000: Martin, “Unredressed Wrong,” *supra*, note 24.

⁴⁰ Affidavit of Myrtle Poor Bear sworn before clerk B. Berry, March 31, 1976. Exhibit No. 1 of the Canadian Hearing, October 25, 2000: Martin, “Unredressed Wrong,” *supra*, note 24.

Ron Basford ordered Mr. Peltier's extradition as it had "not been demonstrated" to him that the offenses were of a political character, the only issue he considered. The surrender was ordered in spite of evidence and submissions concerning the conditions on Pine Ridge and FBI misconduct in the matter of the false Poor Bear affidavits.⁴¹

2. Noble Cause Corruption

There is no doubt that the affidavits were untrue (their falsity has long been acknowledged by Canadian and U.S. prosecutors alike). The issue rather has been whether the FBI agents who prepared the case, Agents Wood and Price, should have known (or did know) that Myrtle Poor Bear was not a witness to murder, nor the recipient of a confession.⁴² The evidence that points to the latter conclusion has two parts.

First, the means by which Myrtle Poor Bear was "developed" as a witness is a classic example of the risks inherent in informant evidence generally.⁴³ At the

⁴¹ Press Release, Minister of Justice, December 17, 1976: Martin, "Unredressed Wrong," *supra*, note 24.

⁴² In 1978 at Peltier's first appeal, U.S. prosecutor Evan Hultman acknowledged that Poor Bear had no truthful evidence to give. He said there "was not one scintilla of evidence that showed that Myrtle Poor Bear was there, knew anything, did anything" and agreed with the comment from the bench that the FBI had to know they were doing something wrong in their repetitive questioning of Poor Bear. Excerpts from oral argument from magnetic tape U.S. Court of Appeals for the Eighth Circuit, April 12, 1978 (No. 77-1487) at 7326-7, Martin, "Unredressed Wrong," *supra*, note 24. A few days later they clarified the admission of misconduct while confirming that Poor Bear's affidavit evidence was not true. In a letter of April 18, 1978, "The government has never conceded that Myrtle Poor Bear's allegations at trial concerning alleged threats and coercion by the FBI are true. In fact, we categorically deny they are true. What we conceded at oral argument is what we contended at trial and in our appellee's brief, namely, that Myrtle Poor Bear was indeed an incompetent and unbelievable witness. We also conceded that when viewed in context of the full investigation, her statements to the FBI that she was an eyewitness on June 26, 1975, are probably not true," cited L. Erin McKey, Counsel, International Assistance Group, Department of Justice, United States of America v. Leonard Peltier, File Review (May 1994), online: <<http://canada.justice.gc.ca/en/dept/pub/rev/extrad76.html>> (date accessed: June 4, 2002).

⁴³ The use, protection of and risks associated with police informants is well known to the law. In *R v. Scott*, [1990] 3 S.C.R. 979, at 994, Cory J. stressed the importance of informers in general and in particular in the context of drug investigations: "The value of informers to police investigations has long been recognized. As long as crimes have been committed, certainly as long as they have been prosecuted, informers have played an important role in their investigation." An informer survived a Charter challenge in *R v. Hunter* (1987), 57 C.R. (3d) 1 (Ont. C.A.). It has also been the subject of considerable study by criminologists. Clifford Zimmerman sets out the long history and chequered history of informants use in Zimmerman, "From the Jailhouse to the Court-house: The Role of Informants in Wrongful Convictions" in Westervelt and Humphrey (eds.), *Wrongly Convicted: When Justice Fails* (2001) at 57-59. And see Wool, "Police Informants in

hearing before Justice Kaufman, Ms. Poor Bear described in detail the steps taken by the agents to isolate her from family and friends and to intimidate her into co-operating with the “script” they had prepared for her.⁴⁴

Second, the FBI was not able to corroborate the statements taken from Ms. Poor Bear (which she insists were composed by the agents) in any particular. Efforts to find corroboration even for her presence on Pine Ridge failed. Analysis of the approximately 100 unidentified fingerprints at the scene of the crime failed to link even one to Myrtle Poor Bear.⁴⁵ Perhaps most significantly, in light of present knowledge, the agents took active steps to “develop” corroboration for Poor Bear in the form of two jailhouse informants. The first one, Marvin, claimed to know that Myrtle Poor Bear was Leonard Peltier’s girlfriend, the first foundation fact in her affidavits (in reality they had never met).⁴⁶ However, “Marvin” was too unreliable a witness, in the prosecutor’s opinion, and he never testified.⁴⁷

Canada: The Law and Reality” (1985-86), 50 Sask. L. Rev. 249; Farris “The Confidential Informant: Management and Control, in Palmietto (ed.), *Critical Issues in Criminal Investigations* (1988). All of the many texts written for police officers on the subject all urge caution in regard to the high risk of obtaining false information: Mallory, *Informants, Development and Management* (2000). For a detailed description of that risk and the careless management of informant evidence that was the practice in the FBI for many years, see the May 2001 statement of John C. Ryan, a Special Agent of the Federal Bureau of Investigation (FBI) from February 28, 1966 to October 11, 1987, in the Bari/Cherney civil rights suit against the FBI and Oakland Police, online: <<http://www.judibari.org/Ryan050701.html>> (date accessed: April 3, 2002).

⁴⁴ Canadian Hearing, October 25, 2000, Evidence of Myrtle Poor Bear. Ms. Poor Bear had never been permitted to give this evidence. Attempts to have it heard at Leonard Peltier’s trial were unsuccessful when the trial judge ruled her evidence inadmissible. The prosecution decided not to call her, acknowledging that she “had no evidence to give” and calling her “incompetent,” a position accepted by the trial judge. He said:

If the witness as she testified yesterday were to be a believable witness, the Court would have seriously considered allowing her testimony to go to the jury on the grounds that if believed by the jury the facts she testified to were such that they would shock the conscience of the Court and in the interests of justice should be considered by the jury. However, for the reasons given on the record yesterday the Court concluded the danger of confusion of the issues, misleading the jury and unfair prejudice outweighed the possibility that the witness was believable.

United States of America v. Leonard Peltier (1977), at 4657, McKey, File Review, *supra*, note 42.

⁴⁵ Canadian Hearing, October 25, 2000, at 165, line 15 — Evidence of Bruce Ellison. This evidence became available through the *Freedom of Information Privacy Acts* (FOIPA), U.S.A. after Leonard Peltier’s conviction. Exhibits No. 4 and 9 of the Canadian Hearing, October 25, 2000: Martin, *Brief, supra*, note 32.

⁴⁶ Exhibit No. 11 of the Canadian Hearing, October 25, 2000: Martin, *Brief, supra*, note 32.

⁴⁷ Canadian Hearing, October 25, 2000, at 170, lines 5-8 — Evidence of Bruce Ellison: Martin, *Brief, supra*, note 32.

The second jailhouse informant, James Adrian Harper, claimed that Darrelle Butler⁴⁸ had provided him with a detailed account of the shootout that had occurred on June 26, 1975,⁴⁹ and allegedly told him that Myrtle Poor Bear was in the Jumping Bull compound on Pine Ridge when the two FBI agents were shot and killed (the other essential foundation for the extradition affidavits).⁵⁰ His testimony was not believed, and, like Bragg, he was never called as a witness against Peltier.⁵¹

The dangerously unreliable nature of the evidence of jailhouse informants such as these, is now notorious.⁵² They only provide information against other inmates when they are promised or hope to receive a reward, which “include[s] jailhouse privileges, monetary payments, benefits to third parties, early parole, reductions in sentence and the dismissal of pending charges.”⁵³ The desire to receive such a reward can strongly motivate a prisoner to lie or provide inaccurate information to the authorities.⁵⁴ However, the risk that a witness may lie is inherent in any justice system. The true danger of this category of witness is the risk (well established in the known cases) that, by acquiring information about the prosecution’s case, they will purposefully corroborate details of that case. They fraudulently incorporate those details into the yarn they spin. Neither Bragg nor Harper were credible witnesses. In fact both were proven liars. Significantly, both chose to incorporate the “fact” that Myrtle Poor Bear was at the

⁴⁸ The original murder indictment named Robert Robideau, Darrelle Butler, Leonard Peltier and Jimmy Eagle as co-accused in the murder of Agents Williams and Coler. Leonard Peltier sought refuge in Canada while Robideau and Butler’s trial was held in Cedar Rapids, Iowa, in 1976. It was for this trial that the informants were “developed.” The Cedar Rapids jury, who heard evidence concerning FBI conduct and the shootout that was excluded from Leonard Peltier’s later trial in South Dakota, acquitted Butler and Robideau on the basis of self-defence. Canadian Hearing, October 25, 2000, at 168, line 10 — Evidence of Bruce Ellison: Martin, *Brief, supra*, note 32.

⁴⁹ Exhibit No. 14 of the Canadian Hearing, October 25, 2000: Martin, *Brief, supra*, note 32.

⁵⁰ Exhibit No. 14 of the Canadian Hearing, October 25, 2000: Martin, *Brief, supra*, note 32.

⁵¹ Canadian Hearing, October 25, 2000, at 173, line 12: Martin, *Brief, supra*, note 32.

⁵² Sherrin, “Jailhouse Informants, Part I: Problems with their Use” (1997), 40 *Crim. L.Q.* 106, at 108; Zimmerman, *supra*, note 43, at 57-59. As Cory J. said:

Jailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice.

Jailhouse Informants, Their Unreliability, and the Importance of Complete Crown Disclosure Pertaining to Them, [The Sophonow Inquiry], *supra*, note 13.

⁵³ Sherrin, *ibid.*, at 110.

⁵⁴ *Ibid.*, see Kaufman, *Commission on Proceedings Involving Guy Paul Morin*, “Executive Summary,” *supra*, note 24.

Jumping Bull Ranch — a fact that was patently false. The challenge for the Rule of Law is that Myrtle Poor Bear was presented to the extradition hearing as an eyewitness to Leonard Peltier's execution-style murder of two FBI agents. She was presented as an intimate, as his girlfriend, a woman to whom he confessed his deliberate plan to commit a terrible murder. She was none of these. She was only a "vital part" of a concocted extradition case. It may be that when the FBI agents were constructing the case for Leonard Peltier's extradition, they believed he was responsible for the tragic deaths of Agents Williams and Coler, and that "developing" proof when none existed was therefore justified. It is likely that the prosecutors in the case believed it. It is almost certain that the thousands of FBI agents and others who today fight so strenuously to keep Leonard Peltier imprisoned believe it. That belief does not make it so.

The lessons learned from wrongful convictions have prompted new rules to resist the dangers posed by witnesses such as these. Justice Cory recommended that as a general rule, jailhouse informants should be prohibited from testifying, and, even when a special case for their testimony could be made (his example was that they could provide the location of a kidnap victim), that exhaustive safeguards be followed and that a lengthy mandatory warning be given to the jury who heard their evidence. Those safeguards were not in place in 1976 when Leonard Peltier was extradited from Canada, nor when successive courts refused to consider the evidence concerning the Poor Bear affidavits,⁵⁵ and thus his case foreshadows the wrongful conviction scandals of recent years, and the brief moment in 2001 when the reliability of result was a factor in consideration of due process.

V. BURNS AND RAFAY

Little more than a year ago, the Supreme Court finished hearing the extradition case of Glen Sebastian Burns and Atif Ahmad Rafay.⁵⁶ The State of Washington was seeking the extradition of the two 18-year-old Canadians on first degree murder charges and intended to seek the death penalty if convictions were secured. The issue before the Court was whether extradition without obtaining assurances that the death penalty would not be imposed infringed

⁵⁵ In May 1989, Peltier sought leave to appeal the extradition to the Supreme Court of Canada. The leave application was dismissed after an oral hearing. Although no transcript of the hearing was available for review, file notes show that during oral argument, La Forest J. observed that any effective extradition arrangement requires good faith and suggested that the Poor Bear episode raised questions about the *bona fides* of the extradition process. However, he concluded that the issue involving the Poor Bear affidavits was, in the circumstances of the case, one for the parties to the extradition arrangement and not for the courts. McKey, File Review, *supra*, note 42.

⁵⁶ *United States v. Burns*, *supra*, note 15.

Burns' and Rafay's constitutional rights. The Court had dealt with the same issue a decade earlier, and concluded that they would not.⁵⁷ In 2001 they held that section 7 would be violated by an extradition without assurances. What had changed?

The change was that the risk that we would "get it wrong" can no longer be ignored. In the first paragraph of the *en banc* judgment, the Court commenced their analysis with that recognition:

Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, aided by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent. The instances in Canada are few, but if capital punishment had been carried out, the result could have been the killing by the government of innocent individuals. The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case. Other countries have also experienced revelations of wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution.⁵⁸

The Court went on to assess the "balancing act" required when the Charter is relied on as a means to scrutinize either a decision like that exercised by a judge in an extradition,⁵⁹ or the Minister pursuant to section 25 of the *Extradition Act*.⁶⁰ For the Court, the risk of wrongful conviction became a central feature of a decision to resile from *Kindler* and *Ng*. Ten years ago the international approbation of the death penalty was less well developed, and the Court was moved then by the *in terrorem* argument that Canada might become a "haven" for desperate murderers fleeing the death penalty if the assurance not to execute a fugitive were sought. In *Burns* that argument was overborne by the concern over error:

The avoidance of conviction and punishment of the innocent has long been in the forefront of "the basic tenets of our legal system". It is reflected in the presumption of innocence under s. 11(d) of the *Charter* and in the elaborate rules governing the collection and presentation of evidence, fair trial procedures, and the availability of appeals. The possibility of miscarriages of justice in murder cases has long

⁵⁷ *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Reference re Ng Extradition (Canada)*, [1991] 2 S.C.R. 858.

⁵⁸ *Burns*, *supra*, note 15, at para. 1.

⁵⁹ They affirmed the approach taken in earlier cases, including *Kindler*, *supra*, note 57, but query whether they were much closer to the more substantive examination conducted by Arbour J. in *United States v. Cobb*, *supra*, note 15, and the related decisions.

⁶⁰ R.S.C. 1985, c. E-23 [s. 25 rep. and sub. 1992, c. 13, s. 5].

been recognized as a legitimate objection to the death penalty, but our state of knowledge of the scope of this potential problem has grown to unanticipated and unprecedented proportions in the years since *Kindler* and *Ng* were decided. This expanding awareness compels increased recognition of the fact that the extradition decision of a Canadian Minister could pave the way, however unintentionally, to sending an innocent individual to his or her death in a foreign jurisdiction.⁶¹

The analysis continues with a summation of the most well known of the Canadian wrongful conviction cases, although with no acknowledgement of the frailty of the extradition process itself:

Our concern begins at home. There have been well-publicized recent instances of miscarriages of justice in murder cases in Canada. Fortunately, because of the abolition of the death penalty, meaningful remedies for wrongful conviction are still possible in this country.

The first of a disturbing Canadian series of wrongful murder convictions, whose ramifications were still being worked out when *Kindler* and *Ng* were decided, involved Donald Marshall, Jr. He was convicted in 1971 of murder by a Nova Scotia jury. He served 11 years of his sentence. He was eventually acquitted by the courts on the basis of new evidence. In 1989 he was exonerated by a Royal Commission which stated that:

The criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the Court of Appeal in 1983. The tragedy of the failure is compounded by evidence that this miscarriage of justice could — and should — have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall, Jr. is a Native.

(Royal Commission on the Donald Marshall, Jr., Prosecution, *Digest of Findings and Recommendations* (1989), at p. 1)⁶²

A closer analysis of the Donald Marshall, Jr., miscarriage of justice would have demonstrated that the means utilized to secure his wrongful conviction are difficult to uncover at trial — and impossible to reach in a proceeding like an extradition. Donald Marshall, Jr., was an aboriginal teenager “known to police” when he was wrongly convicted of murdering his friend, an African-Canadian youth named Sandy Seale. Police, with little to go on other than bias, jumped to the conclusion that Marshall, Jr., was the killer, even though it was Marshall who flagged down police to get help for himself (he had been wounded by the

⁶¹ *Burns*, *supra*, note 15, at para. 95.

⁶² *Ibid.*, at paras. 96-97.

real killer) and his friend after they were attacked. Police wanted to believe that Marshall was the killer and did not want to believe that a middle-aged white man had in fact killed Seale and attacked Marshall. The police did not bother to investigate the crime scene or search for independent witnesses. Instead, they “developed” informant evidence. They pressured Marshall’s teenaged acquaintances with threats of criminal charges and imprisonment into becoming informers against him. In a racially charged community, that was all that was needed to secure sufficient (false) evidence to obtain a conviction.⁶³ Instead the Court focusses on the finality of the death penalty:

Accordingly, when Canada looks south to the present controversies in the United States associated with the investigation, defence, conviction, appeal and punishment in murder cases, it is with a sense of appreciation that many of the underlying criminal justice problems are similar. The difference is that imposition of the death penalty in the retentionist states inevitably deprives the legal system of the possibility of redress to wrongfully convicted individuals.⁶⁴

VI. CONCLUSION

It is doubtful that the purely formalistic analysis of due process demonstrated in the extradition cases will ever be enough to ensure that no one is wrongly extradited or expelled from Canada, just as it will not necessarily lessen the risk of more wrongful convictions. *Burns* illustrates both the strengths and the weaknesses of this approach. Its strength is found in its pragmatic but powerful simplicity — if a practice is clearly egregious enough, it can and will be stopped. However, the path to demonstrating that level of harm is remarkably difficult. In the case of *Burns*, scores of innocents were convicted and even executed before the significance of the guarantee of the presumption of innocence rose above the rhetorical.

There are reasons for adhering to formalistic rather than substantive notions of due process. The ideological functions of criminal prosecutions are enhanced by preserving the myth that guilt or innocence is always resolved through fair and public trials where the facts are contested and the law is challenged. That myth in turn generates and sustains other, less benign beliefs, most notably that the accused “criminal” has “more rights” than do crime victims; and, that the criminal justice system is “soft” on crime. The combination of these latter two

⁶³ Hickman, Poitras and Evans, *Royal Commission on the Donald Marshall, Jr. Prosecution* (1989).

⁶⁴ *Burns*, *supra*, note 56, at para. 104.

myths in turn fuels government responses to demands for more harsh and determinate sentences, and arguably influences the Courts in their interpretation of the meaning and content of the due process guarantees.⁶⁵

The reality that lays bare the myth about the protections of due process safeguarding convictions is something more dark, more troubling. Most cases in the criminal justice system involve targeted, racialized, marginalized people who are known to each other and known to the “system,” and most of these cases are resolved not in fair and public trials but in secret, through plea negotiations. Fewer than 10 or 20 percent of charges actually proceed to a contested trial,⁶⁶ and of that percentage, a much smaller number involve cases where factual guilt is at issue. Most of the litigated disputes concern matters of justification, such as self-defence or consent, or of intention or state of mind, rather than a question concerning the identity of the perpetrator, or whether a crime has occurred at all. True “who done it” or “what happened” crimes are relatively rare. However, they are also the cases that on the one hand command headlines and dominate politically motivated “law and order” rhetoric, and that on the other hand generate wrongful convictions because of tunnel vision and noble cause corruption. We must learn from these errors. Due process must mean more than an appearance of fairness.

But it appears that we have not. Just months after the attacks on the World Trade Centre and the Pentagon, due process stopped being identified as providing a safeguard against the risk of an irreversible error. Instead the more usual formalistic requirement where even the likelihood of the torture of a person expelled from Canada is constitutionally acceptable⁶⁷ if the security claim (secretly crafted and impossible to test) is framed in strong enough terms. Untested certificate evidence of “danger to the security of Canada” and/or “terrorism,” if formal requirements are met by the Minister exercising his or her statutory discretion, survive all that is known and objected to in the deportation of persons to face torture. No discussion of the risk of error or the evidentiary foundation of the terror claim can be found in the judgment. Once more we rely upon the unreliable. Nothing much has changed, except that now we know how dangerous that can be.

⁶⁵ Martin, “Retribution,” *supra*, note 12.

⁶⁶ In 1983 in Canada, the guilty plea rate was 80 percent: Solomon, *Criminal Justice Policy: From Research to Reform* (1983), at 37. In 2001, Stephanos Bibas cites U.S. Department of Justice, Bureau of Justice Statistics in his study of the pressures to plead criminal cases to the effect that fewer than 4 percent of adjudicated felony defendants have jury trials, and another 5 percent have bench (judge alone) trials. 91 percent plead guilty. These figures exclude cases in which the prosecution was dropped, dismissed, or otherwise terminated before verdict. Bibas, “Judicial Fact: Finding and Sentence Enhancements in a World of Guilty Pleas” (2001), 110 Yale L.J. 1047, fn 9.

⁶⁷ *Suresh v. Canada (Minister of Citizenship and Immigration)* (2002), 90 C.R.R. (2d) 1 (S.C.C.).

Extradition, The Charter, and Due Process: Is Procedural Fairness Enough?	161
I. Introduction	161
II. Wrongful Convictions, Extradition and the Rule of Law	164
III. The Laboratory of Wrongful Convictions	168
IV. The Extradition of Leonard Peltier.....	170
1. Tunnel Vision.....	172
2. Noble Cause Corruption.....	174
V. Burns and Rafay	177
VI. Conclusion.....	180